IN THE

Supreme Court of the United States

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EDWIN F. STOVELL, On Behalf of Himself and the Officers and Crew of the U. S. S. Nanshan, *Appellant*,

vs.

GEORGE DEWEY, Admiral, Etc., U. S. Navy, *Appellee.*

No. 656.

BRIEF FOR APPELLANT, EDWIN F. STOVELL.

Statement of Case.

As this case was tried before the Court of Claims upon the same evidence as it will be tried upon in this Court, the statement of the case made by Chief Justice Nott in the Court of Claims, is adopted by the appellant.

"On the 6th of April, 1898, the Secretary of the Navy sent the following despatch to Commodore Dewey, then at Hongkong:

"Washington, April, 1898.

"Dewey, Hongkong:

"Purchase immediately Nanshan and one more vessel for supplies. Charge special appropriation. * * * Enlist for special service, if possible, one year, unless sooner discharged, the crew of. Detach and order assume command of each an officer. Arm, if possible.

Long."

On the 19th of April, Commodore Dewey cabled the following despatch to the Secretary of the Navy:

"Hongkong, April 19, 1898.

"Secretary of the Navy, Washington:

"Zafiro and Nanshan have not been commissioned. Have been registered as American steamers. Commissioned officers command each vessel; four men; armed. Original officers and men have been shipped, merchant service. Both vessels have been cleared Bonin Islands, North Pacific. I believe present status preferable in event of hostilities. They can obtain supplies and coal in Shanghai for men-of-war.

Dewey."

(Report, Secretary of Navy, 1898, Vol. II, p. 66.)

After the purchasing of the vessel and the shipping of her crew, Commodore Dewey detailed Lieut.-Commander Benj. W. Hodges to take command of the vessel. The orders of the Commodore were verbal. They were, as detailed by Lieutenant-Commander Hodges, as follows:

"I reached Hongkong on the night of April 10, 1898, and reported to Commodore Dewey on the Olympia, on the morning of the 11th—the next morning. He ordered me to go on board the Nanshan and take with me four enlisted men. He told me that later on he would fit the Nanshan out with guns from the other ships of the fleet. He told me that the Nanshan was a ship that he had just bought and that she was loaded with the best quality of Welsh coal, and that she had 3,000 tons on board. He

said that he had offered the men of the ship double pay to stay on board of her. My duties were to take general charge of the ship and obey all orders that either he gave me direct or thorough the flag-lieutenant, and to execute all the movements that were ordered from the flag-ship, and in general to control the movements and actions of the Nanshan, but not to interfere with the internal discipline, and such things as loading and discharging cargo, but to leave those matters in the hands of Captain Stovell, who was the captain of the ship, before she was bought and accepted by Admiral Dewey" (R., p. 185).

The movements of the Nanshan towards and at Manila are thus described by her commanding officer:

"The Nanshan was an integral part of the fleet, as much so as any other ship. She kept her position in the fleet all the way across, and after Admiral Dewey stopped the fleet at Subig Bay and ordered the commanding officers to come on board the flagship for his final instructions, I went over and received his instructions for entering Manila Bay, and then returned to the Nanshan and the fleet started in single colum, the Olympia leading, followed by the Baltimore, the Raleigh, the Petrel, the Concord, the Boston, the McCullough, the Nanshan, and the Zafiro. It was a regular fleet formation, and it was in this order that we passed the forts. The forts on the south side of the channel fired on the ships of the fleet as they were going into Manila Bay, and the Nanshan and the Zafiro passed through the whole zone of fire" (R., p. 185).

The fleet was divided by Commodore Dewey into three divisions, and the Nanshan was assigned to the third division. Lieutenant-Commander Hodges thus testifies as to her part in the engagement:

"After passing the forts, the third division, of which the Nanshan was one, came up on the left flank of the other ships and steamed up in that order until we saw the lights of the city of Manila ahead. The order was then

given by the flag-ship to stop. The whole fleet stopped without anchoring and lay still untill early daylight. At daylight the Spanish forts at Manila and Sangley Point opened fire on the fleet, and as soon as the land and the surroundings could be made out clearly, the Admiral made signal for the first and second divisions to follow the flagship. This left the McCullough, Nanshan and Zafiro, which comprised the third division, in reserve, while the first and second divisions steamed up and brought on the action with the Spanish fleet. These three ships stayed in reserve during the time of the action, within easy signal and supporting distance, and the Nanshan all that time was ready to join in battle in case she was ordered to do so or to render assistance to any of her ships. The flagship at 7.30 in the morning made siginal to withdraw from action. They steamed out close to where we were lying and signaled for the third division to take position as before. At 11.30 the first and second divisions steamed into Sangley Point and renewed the action with the batteries on shore and such of the Spanish ships as were still in condition to fight, and again the Nanshan lay ready to obey any signal that might have been given. It was about 1 p. m. when the Spaniards hoisted the white flag at the naval station of Cavite and the Admiral then made signal to anchor at discretion. The flagship steamed up to the city of Manila and I gave orders for the Nanshan to steam up, and we went past the flagship, and I anchored closer to the city than she was" (R., p. 186).

The first and second divisions during the action formed a firing line 2,500 yards distant from the Spanish vessels (R., p. 192). The third division formed a line 2,500 yards in the rear of the first and second divisions. Many of the Spanish guns had a range of more than 5,000 yards, and the third division was within range of shot that might have passed over the fleet (R., p. 195).

The Nanshan did not fire during the engagement, and her fire, if directed at the Spanish forts or vessels would have been ineffective from the position which she occupied.

She was able, in the opinion her commanding officer, to "sink a torpedo boat or whip quite a number of the little Spanish gunboats, which we knew the Spaniards had there. They were known to have fourteen or fifteen boats scattered around the islands, and in my opinion she could have whipped anything such as the Callao and the Urdaneta." Admiral Dewey called her commanding officer's attention to the fact that she had a good "ram bow" (R., p. 190).

Assignment of Errors.

I. The court erred in decreeing that the Nanshan (and with her the Zafiro) did not participate in the captures growing out of the Battle of Manila Bay, and was not entitled to share in the prize property.

II. The court erred in decreeing that the Nanshan (and with her the Zafiro) was not an armed vessel of the United States within signal distance of the vessel or vessels making the captures, at the Battle of Manila Bay, on May 1, 1898, under such circumstances and in such condition as to be able to render effective aid, if required, and was not entitled to share in the prize property.

III. The court erred in holding that the Nanshan (and with her the Zafiro) was not entitled to a share in any of the prize property captured at the Battle of Manila Bay, on May 1, 1898.

Argument.

I.

WAS THE NANSHAN A VESSEL OF THE NAVY?

It may be observed that when Admiral Dewey appointed a naval board of appraisal and survey, after the Battle of Manila Bay, the Nanshan and Zafiro were treated by

the Board of Survey as United States ships engaged in capturing enemy's property (R., pp. 111, 112).

When Admiral Dewey filed his libel in prize, he set out the fact that the Nanshan and Zafiro were armed vessels, officered and manned by the United States, and under the control of the Navy Department, and that they were a part of the squadron under his command at the Battle of Manila Bay (R., p. ii). Not until the intervening libel of Edwin F. Stovell was filed, on the 26th day of March, 1901 (R., p. xiii), was it contended that the Nanshan and Zafiro were not a part of the effective fighting force of the Navy at that battle. The fact that the officers of the United States Navy never questioned the right of these vessels to share in the prize money for three years, but on the contrary admitted their status to be such as would entitle them to share, goes far to show that the facts were such as would entitle them to share in the property captured.

The decision in this case, depends upon the construction of the following sections of the R. S. U. S.:

"Section 4614. The term 'Vessel of the Navy,' includes all armed vessels officered and manned by the United States under the control of the Department of the Navy."

"Section 2632. All vessels of the Navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize."

"Section 4631. * * * the residue shall be distributed and proportioned among all others *doing duty on board* * * * and borne upon the books of the ship, in proportion to their respective rate of pay in the service."

Section 4614, R. S. U. S., makes all armed vessels

officered and manned by the United States, and under the control of the Department of the Navy, vessels of the Navy. The Nanshan was purchased by Admiral Dewey under instructions from Secretary Long, commanding him to enlist her crew for special service, and detach and order an officer to her command, and to arm her, if possible (Report, Secretary of Navy, 1898, Vol. II, p. 66).

On April 19, 1898, Admiral Dewey cabled the Department as follows:

"Secretary of the Navy, Washington:

"Zafiro and Nanshan have not been commissioned. Have been registered as American steamers; commissioned officers command each vessel; four men; armed. Original officers and men have been shipped, merchant service. Both vessels have been cleared for the Bonin Islands, North Pacific. I believe present status preferable in the event of hostilities. They can obtain supplies and coal in Shanghai for men-of-war" (R., p. 178).

It will be observed from this despatch that it was the opinion of Admiral Dewey, before the Battle of Manila Bay, that the Nanshan was *armed*. The reason for not following out the instructions of the Secretary of the Navy to the letter and enlisting the crew, was because he could send them to the Chinese ports for supplies or coal, which could not be done in case the crew was regularly enlisted. This was a matter of expediency with Admiral Dewey, but, to all intents and purposes, he carried out the instructions of the Secretary. He made the Nanshan a part of the fleet; he armed her with two long 1-pounders, eleven rifles, and eleven revolvers and put her under the command of a regular naval officer.

Lieutenant-Commander Hodges was detailed to her command, and the regular crew was retained in the service of the United States. Four enlisted men were brought on board by Lieutenant-Commander Hodges. It

is admitted that the regular crew was composed of Englishmen and Chinese, but they were in the service of the United States under a contract made by Admiral Dewey, carrying out the instructions of the Secretary of the Navy, who acted for the President. They were in danger of being sunk, both when they entered the bay and during the battle, and if the Nanshan was not a vessel of the United States Navy, they were exposed to the penalties of piracy.

It is true that the armament of the Nanshan was light, but this grew out of the necessities of the case. There was no shipyard convenient, and the only guns to place upon this vessel were such as could be spared from the other vessels of the fleet. Even with the light armament she had, it would have been absolutely impossible for the four enlisted men to have handled the two guns, to say nothing of the rifles and revolvers. These guns could not have been operated without the assistance of the regular crew, and placing them on board shows that Admiral Dewey intended to use the regular crew in the battle should the necessity arise. The original crew was shipped in the merchant service for the benefit of the entire fleet. During the battle their danger was great, and they were subject to the absolute command of the Admiral. It is difficult to see why their equity is not as strong as that of any of the enlisted men of the fleet.

That the Nanshan was a vessel of the navy is established by both reason and authority. Section 4614, R. S. U. S., says "that the term 'vessel of the navy' includes all armed vessels, officered and manned by the United States and under the control of the Department of the Navy." The Nanshan was purchased by the United States out of the emergency fund, she was armed, officered and manned by the United States through Admiral Dewey, and was an integral part of the squadron at the Battle o

Manila Bay. The above section does not require that the crew should be enlisted, but only that the vessel should be officered and manned by the United States, and under the control of the Navy Department. Can it be said that a vessel is not manned by the United States, when its sailors are employed and paid by the Government of the United States? Can it be said that she was not an armed vessel of the United States, when the Secretary of the Navy ordered her to be purchased and armed; the Admiral in command reported that he had armed her; and it appears from the evidence that, so far as circumstances would permit, he had acted in accordance with the instructions of the Department; and that before and during the Battle of Manila Bay she was a vessel of the squadron, acting as a unit in the capture of the Spanish fleet?

The Nanshan falls within the express terms of the law defining a vessel of the Navy.

It was not necessary that this vessel should be regularly commissioned, even if sending an officer to command her and raising the flag, did not have this effect. The power to convert merchant vessels into vessels of war has been possessed always by commanding officers. This is illustrated by the decision of Sir William Scott in the case of the Georgiana. This vessel was captured by the Essex, manned and armed with guns from the captor, and sent on a cruise. Subsequently she was recaptured, whereupon a claim was interposed by the owners. The English prize law required the return of English ships to their owners, unless they had "set forth as ships of war by the enemy." The court held that it was not necessary that she should have been formally commissioned to make her a vessel of war, but only that she should have been employed in the public military service of the enemy, by those who had competent authority to so employ her, and

that the commander of the Essex possessed such authority.

The Georgiana, 1 Dod., 401.

In the case of the Ceylon, 1 Dod., 115, the same learned Judge says:

"We know extremely well that in remote parts of the world, where domestic authority can not be immediately resorted to, commanders are, of necessity, vested with larger powers than are usually entrusted to them when employed upon European stations,"

and held that the Ceylon having been equipped by a naval officer, was a vessel of war. In the case at bar, Admiral Dewey was not only in a remote part of the world, but he was expressly ordered to enlist this vessel in the service of the United States.

Under both the written law and the authorities, the Nanshan was a vessel of the Navy of the United States.

II.

IS THE NANSHAN ENTITLED TO SHARE IN PRIZE MONEY?

Section 4632, R. S. U. S., provides as follows:

"All vessels of the Navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize."

Before discussing this section it will be useful to consider the English prize law, in the light of the decisions of Lord Stowell. The Act of 13th George II, Chapter 4, provided that the officers, seamen, marines and soldiers, "on board every ship or vessel in His Majesty's pay should have the sole interest and property in all and every

ship, vessel, goods and merchandise which they *shall take.*" Under the express words of this statute, the right to share in the prize was limited to the officers and crew of the ship which *shall take* the vessel of the enemy. Lord Stowell construed this statute so as to bring within its terms a constructive taking. Naval vessels in sight, and associated in the common enterprise of capturing a particular enemy were held to be within the statute, although they took no part in the actual taking. Holding themselves in readiness under general orders, and the squadron acting as a unit under a general plan of cooperation, they were considered as constructively engaged in the capture, although inactive.

The Guilliame Tell, 1 Edw., 11.
The Empress, 1 Dod., 373.
The Vryheid, 2 C. Rob., 20.

Naval vessels were also held to be parties to the taking when they were in sight, under such circumstances as to occasion intimidation to the enemy, and encouragement to a friend.

La Melanie, 2 Dod., 125.

It is apparent that Section 4632, R S. U. S., is based upon this English statute, as interpreted by Lord Stowell. If the vessel was in sight and taking part in the general operations of the squadron, she was entitled to share in the prize. If her activity, size, or general appearance was such that she may have alarmed the enemy, she was likewise entitled to share in the prize, notwithstanding the fact that she may have been at the time temporarily unable to assist in the fight on the account of the unfavorable condition of the tide or wind.

There was no question that the Nanshan (and with her

the Zafiro) was within signal distance of the entire fleet during the battle. That she was under such circumstances and in such a condition as to be able to render effective aid, if required, we think clearly demonstated by the evidence. Her commanding officer testified that with the two long 1-pounders, she could sink a torpedo boat, and probably whip a number of the small gunboats, with which the Islands were infested (R., p. 190). If she could do this she certainly added materially to the fighting force of the squadron, and must have been considered a dangerous ship by that portion of the opposing squadron which might have been sent out to destroy with torpedoes the larger ships.

The question is, what would have been effective aid, if it had been required during the battle? If a torpedo boat or gunboat had stolen out with the object of using torpedoes upon the fleet, would it not have been effective aid if the Nanshan had frustrated this intention by sinking her? If the exigencies of the battle had required that one of the enemy's vessels should have been rammed, would it not have been effective aid, if the Nanshan had been used for that purpose? If the Olympia, or other vessel of the fleet, had been disabled by the fire of the enemy, and the Nanshan had been called upon to tow her out of range of the enemy's guns, would not this have been effective aid? If an American vessel had been sunk, and the boats of the Nanshan had been successful in saving a part of her fighting force so that they could have been transferred to the guns of another vessel, would not this have been effective aid? If the boats of the Nanshan had picked up men in the water, belonging to the other ships, thus rendering unnecessary the withdrawal of men from the guns of the American ships, would not this have been effective aid?

It must not be overlooked that the Battle of Manila

was fought by the squadron as a unit. The Nanshan was an important part of that unit, although the place assigned to her in the battle was not very prominent. She was kept in reserve, along with the Zafiro and McCullough, responsive to the signals of the Admiral. She was ready to enter into the engagement at any time she might be called upon to do so. The battle was not fought or won by any particular vessel, but by the fleet, acting in unison, carrying out the general plan of cooperation, and thus making certain the result of the battle. It was necessary that some vessels should reserve their fire, and stand ready to answer to any emergency which might arise. That the Nanshan was not called upon was not the fault of the commander or crew of the vessel. It was simply because the course of the battle did not render her services necessary. During the entire time she was within range of the Spanish ships and forts, and ready to act when called upon. Under the circumstances, her crew is entitled to share in the fruits of victory.

"They also serve, who only stand and wait."

III.

IS THE ORNGIAL CREW ENTITLED TO SHARE IN PRIZE MONEY?

Section 4631 provides, after making certain deductions that "the residue shall be distributed and proportioned among all others *doing duty on board* * * * and borne upon the books of the ship, in proportion to their respective rate of pay in the service."

Under this section, all those "doing duty on board," are entitled to share in the prize money. The books of the ship are but the usual evidence of those "doing duty on board."

This court says in the Steever Case:

"Nor is it material that there was no affirmative proof that the launch had any books. The keeping of books is not made a condition of the right of any vessel to share in prize money. The books of the ship are but the usual evidence of *service on board*, and neither the omission to keep books, nor the neglect of the proper officers to enter names upon them can be held to cut off those lawfully assigned to *duty on board and actually doing such duty.* * * * As to the other officers and men, *the doing duty on board* is sufficient *prima facie* evidence, at least that they belonged to the launch and were entitled to share in the prize money."

Steever v. U. S., 113 U. S., 753.

The same construction was adopted in the case of the S. S. Twickenham, by Judge Locke (no opinion) of the District Court of the Southern District of Florida. (R., p. 184.)

The decision in the Rita is also in point. The Yale was chartered by the United States during the last war. She was officered by two naval officers, twenty-five marines, and her regular officers and crew, who were not commissioned by or enlisted in the service of the United States.

The Rita was captured and the marines opposed the right of the regular crew to share in the prize money, contending that the words "in the service" meant in the regular naval service. But the court held that these words meant nothing more than that the distribution should be limited to those aboard the ship; that although not formally enlisted, they were in the service of the Government, and entitled to share in the prize money.

The Rita, 89 Fed. Rep., 766.

It is true that the crew of the Naushan did not have a

rate of pay in the regular naval service, but they did have a rate of pay in the service of the United States. That rate was fixed by Admiral Dewey under the instructions of the Secretary of the Navy, who was discharging a part of the executive duties of the President, and was to all intents and puposes fixed by the President.

These men were also "borne upon the books of the ship." The pay-roll, and merchant enlistment papers (R., pp. 184, 176) constituted such books within the meaning of section 4631. The neglect of the officers to keep books can not cut off those lawfully doing duty on board from sharing in the prize money.

Steever v. U. S., 113 U. S., 753.

As a summary of this case the dissenting opinion of Chief Justice Nott is adopted:

"I can not say that the Nanshan was not an armed vessel, when it appears by the evidence that the Secretary of the Navy ordered her to be armed, and that Commodore Dewey armed her and reported to the Secretary of the Navy that he had done so.

"I can not say that the vessel was not in the service of the United States, when it appears that the United States bought her and manned her and armed her and detailed an experienced officer of the rank of lieutenant to command her.

"I can not say that the vessel did not serve as an armed vessel in the attack on Manila, when her commanding officer testifies that she 'was an integral part of the fleet, as much so as any other ship;' that 'it was a regular fleet formation;' that she was one of the single column of vessels which passed the forts and 'passed through the whole zone of fire;' that 'after passing the forts, the third division, of which the Nanshan was one, came up on the left flank of the other ships and steamed in that order until the lights of the city of Manila were seen ahead.'

"I can not say that the vessel was not within signal distance and able to render effective aid if required, when it appears by the testimony of her commanding officer that she was 'during the time of the action within easy signal and supporting distance and all that time ready to join in battle in case she was ordered to do so or to render assistance to any of the ships,' and that she obeyed every general signal order that was given during the engagement.

"I can not say that the crew of the Nanshan were in the merchant service or acting simply as the crew of an unarmed transport, when it appears by the commanding officer's evidence that they encountered all of the dangers which the men of the regular Navy did from torpedoes and torpedo boats and in passing the forts from the fire of their batteries.

"I can not say that the right given by statute to such men to share in the bounty awarded to a fleet should be defeated because the President had not fixed specifically their rate of pay, when it appears that by his direction, through the Secretary of War, that matter was referred with power to Commodore Dewey, and Commodore Dewey did fix the rate of pay, and that that pay was substantially the rate of pay fixed by the President for seamen and common seamen in the Navy."

Respectfully submitted,

CHARLES W. CLAGETT,

CONRAD H. SYME,

Proctors for Appellant, Edwin F. Stovell.